# CUSTOMS BULLETIN AND DECISIONS

***Weekly Compilation of***

***Decisions, Rulings, Regulations, Notices, and Abstracts***

***Concerning Customs and Related Matters of the***

***Bureau of Customs and Border Protection***

***U.S. Court of Appeals for the Federal Circuit***

***and***

***U.S. Court of International Trade***

**VOL. 40** **JANUARY 25, 2006** **NO. 5**

*This issue contains:*



**DEPARTMENT OF HOMELAND SECURITY**
**BUREAU OF CUSTOMS AND BORDER PROTECTION**

**NOTICE**

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the Bureau of Customs and Border Protection, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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# Bureau of Customs and Border Protection

## *CBP Decisions*

(CBP Dec. 06–02)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR DECEMBER, 2005

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in CBP Decision 05–42 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): December 25, 2005

Brazil real

| | |
|---|---|
| December 19, 2005 | 0.420964 |
| December 20, 2005 | 0.425116 |
| December 27, 2005 | 0.423012 |
| December 28, 2005 | 0.425532 |

India rupee

| | |
|---|---|
| December 5, 2005 | 0.021617 |

Japan yen

| | |
|---|---|
| December 1, 2005 | 0.008290 |
| December 2, 2005 | 0.008280 |
| December 3, 2005 | 0.008280 |
| December 4, 2005 | 0.008280 |
| December 5, 2005 | 0.008276 |
| December 6, 2005 | 0.008277 |
| December 7, 2005 | 0.008269 |
| December 8, 2005 | 0.008315 |
| December 9, 2005 | 0.008296 |
| December 10, 2005 | 0.008296 |
| December 11, 2005 | 0.008296 |

FOREIGN CURRENCIES—Variances from quarterly rates for December 2005 (continued):

Japan yen (continued):

| | |
|---|---|
| December 12, 2005 | 0.008340 |
| December 13, 2005 | 0.008326 |

Dated: January 3, 2006

MARGARET T. BLOM,
*Acting Chief,*
*Customs Information Exchange.*

(CBP Dec. 06–03)

## FOREIGN CURRENCIES

### DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR DECEMBER, 2005

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): December 25, 2005

European Union euro:

| | |
|---|---|
| December 1, 2005 | 1.170200 |
| December 2, 2005 | 1.169900 |
| December 3, 2005 | 1.169900 |
| December 4, 2005 | 1.169900 |
| December 5, 2005 | 1.178700 |
| December 6, 2005 | 1.178400 |
| December 7, 2005 | 1.172200 |
| December 8, 2005 | 1.183000 |
| December 9, 2005 | 1.182400 |
| December 10, 2005 | 1.182400 |
| December 11, 2005 | 1.182400 |
| December 12, 2005 | 1.196900 |
| December 13, 2005 | 1.192600 |
| December 14, 2005 | 1.204100 |
| December 15, 2005 | 1.196500 |
| December 16, 2005 | 1.201200 |
| December 17, 2005 | 1.201200 |
| December 18, 2005 | 1.201200 |
| December 19, 2005 | 1.199600 |

FOREIGN CURRENCIES—Daily rates for Countries not on quarterly list for December 2005 (continued):

European Union euro: (continued):

| | |
|---|---|
| December 20, 2005 | 1.184800 |
| December 21, 2005 | 1.181600 |
| December 22, 2005 | 1.188300 |
| December 23, 2005 | 1.185700 |
| December 24, 2005 | 1.185700 |
| December 25, 2005 | 1.185700 |
| December 26, 2005 | 1.185700 |
| December 27, 2005 | 1.185600 |
| December 28, 2005 | 1.187500 |
| December 29, 2005 | 1.184600 |
| December 30, 2005 | 1.184200 |
| December 31, 2005 | 1.184200 |

South Korea won:

| | |
|---|---|
| December 1, 2005 | 0.000964 |
| December 2, 2005 | 0.000966 |
| December 3, 2005 | 0.000966 |
| December 4, 2005 | 0.000966 |
| December 5, 2005 | 0.000965 |
| December 6, 2005 | 0.000967 |
| December 7, 2005 | 0.000966 |
| December 8, 2005 | 0.000967 |
| December 9, 2005 | 0.000967 |
| December 10, 2005 | 0.000967 |
| December 11, 2005 | 0.000967 |
| December 12, 2005 | 0.000968 |
| December 13, 2005 | 0.000976 |
| December 14, 2005 | 0.000988 |
| December 15, 2005 | 0.000985 |
| December 16, 2005 | 0.000984 |
| December 17, 2005 | 0.000984 |
| December 18, 2005 | 0.000984 |
| December 19, 2005 | 0.000985 |
| December 20, 2005 | 0.000984 |
| December 21, 2005 | 0.000982 |
| December 22, 2005 | 0.000984 |
| December 23, 2005 | 0.000987 |
| December 24, 2005 | 0.000987 |
| December 25, 2005 | 0.000987 |
| December 26, 2005 | 0.000987 |
| December 27, 2005 | 0.000988 |
| December 28, 2005 | 0.000987 |
| December 29, 2005 | 0.000991 |
| December 30, 2005 | 0.000990 |
| December 31, 2005 | 0.000990 |

FOREIGN CURRENCIES—Daily rates for Countries not on quarterly list for December 2005 (continued):

Taiwan N.T. dollar:

| | |
|---|---|
| December 1, 2005 | 0.029797 |
| December 2, 2005 | 0.029824 |
| December 3, 2005 | 0.029824 |
| December 4, 2005 | 0.029824 |
| December 5, 2005 | 0.029860 |
| December 6, 2005 | 0.029886 |
| December 7, 2005 | 0.029869 |
| December 8, 2005 | 0.029851 |
| December 9, 2005 | 0.029851 |
| December 10, 2005 | 0.029851 |
| December 11, 2005 | 0.029851 |
| December 12, 2005 | 0.029806 |
| December 13, 2005 | 0.029895 |
| December 14, 2005 | 0.030014 |
| December 15, 2005 | 0.030139 |
| December 16, 2005 | 0.030193 |
| December 17, 2005 | 0.030193 |
| December 18, 2005 | 0.030193 |
| December 19, 2005 | 0.030139 |
| December 20, 2005 | 0.030075 |
| December 21, 2005 | 0.030075 |
| December 22, 2005 | 0.030111 |
| December 23, 2005 | 0.030184 |
| December 24, 2005 | 0.030184 |
| December 25, 2005 | 0.030184 |
| December 26, 2005 | 0.030184 |
| December 27, 2005 | 0.030221 |
| December 28, 2005 | 0.030248 |
| December 29, 2005 | 0.030395 |
| December 30, 2005 | 0.030488 |
| December 31, 2005 | 0.030488 |

Dated: January 3, 2006

MARGARET T. BLOM,
*Acting Chief,*
*Customs Information Exchange.*

1/3/06

LIQ–03–01–RR:OO:CI

RE: SECTION 159.34 CFR

SUBJECT: CERTIFIED RATES OF FOREIGN EXCHANGE: FIRST QUARTER, 2006

LISTED BELOW ARE THE BUYING RATES CERTIFIED FOR THE QUARTER TO THE SECRETARY OF THE TREASURY BY THE FEDERAL RESERVE BANK OF NEW YORK UNDER PROVISION OF 31 USC 5151. THESE QUARTERLY RATES ARE APPLICABLE THROUGHOUT THE QUARTER EXCEPT WHEN THE CERTIFIED DAILY RATES VARY BY 5% OR MORE. SUCH VARIANCES MAY BE OBTAINED BY CALLING (646) 733–3065 OR (646) 733–3057.

QUARTER BEGINNING January 3, 2006 AND ENDING March 31, 2006

| COUNTRY | CURRENCY | U.S. DOLLARS |
|---|---|---|
| AUSTRALIA | DOLLAR | $0.737900 |
| BRAZIL | REAL | $0.428816 |
| CANADA | DOLLAR | $0.864678 |
| CHINA, P.R. | YUAN | $0.123913 |
| DENMARK | KRONE | $0.160555 |
| HONG KONG | DOLLAR | $0.128974 |
| INDIA | RUPEE | $0.022262 |
| JAPAN | YEN | $0.008595 |
| MALAYSIA | RINGGIT | $0.264550 |
| MEXICO | PESO | $0.093958 |
| NEW ZEALAND | DOLLAR | $0.681500 |
| NORWAY | KRONE | $0.150575 |
| SINGAPORE | DOLLAR | $0.605290 |
| SOUTH AFRICA | RAND | $0.160439 |
| SRI LANKA | RUPEE | $0.009802 |
| SWEDEN | KRONA | $0.128046 |
| SWITZERLAND | FRANC | $0.772917 |
| THAILAND | BAHT | $0.024534 |
| UNITED KINGDOM | POUND STERLING | $1.740400 |
| VENEZUELA | BOLIVAR | $0.000466 |

MARGARET BLOM,
*Acting Chief,*
*Customs Information Exchange.*

# *General Notices*

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
*Washington, DC, January 11, 2006,*

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
*Acting Assistant Commissioner,*
*Office of Regulations and Rulings.*

19 CFR PART 177

## PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE CLASSIFICATION OF A LA PERRUCHE SUGAR CHUNKS

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of proposed modification of a ruling letter and revocation of treatment relating to the tariff classification of A La Perruche sugar chunks.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection ("CBP") intends to modify a ruling letter pertaining to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of A La Perruche brown sugar chunks and to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments are invited on the correctness of the proposed action.

**DATE:** Comments must be received on or before February 24, 2006.

**ADDRESS:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations and Disclosure Law Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street,

NW, Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

**FOR FURTHER INFORMATION CONTACT:** Keith Rudich, Tariff Classification and Marking Branch, (202) 572–8782.

**SUPPLEMENTARY INFORMATION:**

## BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with CBP laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the CBP and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to modify a ruling letter pertaining to the tariff classification of A La Perruche brown sugar chunks. Although in this notice CBP is specifically referring to one ruling, HQ 952419, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice

period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In HQ 952419, dated October 15, 1992, set forth as "Attachment A" to this document, CBP found that A La Perruche brown sugar chunks were classified in subheading 1701.11.0125, HTSUSA, as raw cane sugar, not containing added flavoring or coloring matter.

CBP has reviewed the matter and determined that the correct classification of the A La Perruche brown sugar chunks is in subheading 1701.91.1000, HTSUSA, which provides for "Cane or beet sugar and chemically pure sucrose in solid form: Other: Containing added flavoring or coloring matter: Described in additional U.S. note 5 to this chapter and entered pursuant to its provisions." If not imported as described in additional note 5 to Chapter 17 and not entered pursuant to its provisions, the correct classification of the A La Perruche brown sugar chunks is in subheading 1701.91.3000, HTSUSA, which provides for "Cane or beet sugar and chemically pure sucrose, in solid form: Other: Containing added flavoring or coloring matter: Other."

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to modify HQ 952419, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letter (HQ) 967303, as set forth in "Attachment B" to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: January 10, 2006

Gail A. Hamill for MYLES B. HARMON,
*Director,*
*Commercial and Trade Facilitation Division.*

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 952419
October 15, 1992
CLA–2 CO:R:C:F 952419 LPF
CATEGORY: Classification
TARIFF NO.: 1701.11.0125, 1701.11.0325, 1701.99.0125, 1701.99.0225, 9904.40.20

SIMEON M. KREISBERG, ESQ.
MAYER, BROWN & PLATT
*2000 Pennsylvania Avenue, NW*
*Washington, D.C. 20006–1885*

RE: "A la Perruche" sugar chunks in 1701, HTSUSA; Cane or beet sugar and chemically pure sucrose, in solid form; Agricultural import fees in 9904, HTSUSA; Additional U.S. Note 3 to Chapter 17; Import restrictions; Substantial transformation - Country of origin; Texas Instruments; Superior Wire; HRL 082033.

DEAR MR. KREISBERG:

This is in response to your letter of August 14, 1992, submitted on behalf of Bri-Al, Inc. You request, in regard to "A la Perruche" sugar chunks, the proper classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) and a determination whether the refining of the sugar constitutes a substantial transformation.

FACTS:

The merchandise consists of brown and white irregular sugar chunks sold under the name "A la Perruche." According to your letter, a company in Paris, France imports raw cane sugar from Swaziland. In France, the raw sugar is refined through filtration, crystallization and maturation until the sugar agglomerates into bars. The brown sugar is produced by adding caramelized syrup made from the cane sugar during refining. The bars are broken into irregular lumps and are packaged into 17 and 35 ounce boxes, which are imported into the United States for sale to food service distributors. You state that the brown sugar has a polarity of 98.9 degrees and the white sugar has a polarity of 99.7 degrees. You also explain that the Department of Agriculture does not consider these products to be "Specialty Sugar" as defined in 15 CFR 2011.202 (j) (1992).

ISSUE:

Whether the sugar chunks are classifiable in heading 1701 as cane or beet sugar and chemically pure sucrose, in solid form, or are classifiable elsewhere in the HTSUSA, and whether the refining, in France, of raw sugar, from Swaziland, substantially transforms the sugar into a French product for duty and quota purposes.

LAW AND ANALYSIS:

Classification under the HTSUSA

The General Rules of Interpretation (GRI's) taken in their appropriate order provide a framework for classification of merchandise under the HTSUSA. Most imported goods are classified by application of GRI 1, that

is, according to the terms of the headings of the tariff schedule and any relative section or chapter notes. The Explanatory Notes (EN's) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI's.

Heading 1701 provides for cane or beet sugar and chemically pure sucrose, in solid form. The EN's to 1701 provide, in pertinent part that, "cane sugar is derived from the juices of the sugar cane stalk." As the sugar chunks fit this description, they are classifiable in heading 1701.

At the six digit subheading level, 1701.11 provides for raw cane or beet sugar, not containing added flavoring or coloring matter, while 1701.99 provides for other cane or beet sugar. In this regard, the EN's to 1701 indicate that:

Raw or crude cane or beet sugars occur in the form of brown crystals, the colour being due to the presence of impurities. Their sucrose content by weight, in the dry state, corresponds to a polarimeter reading of less than 99.5 degrees. . . . They are generally destined for processing into refined sugar products. Raw sugar may, however, be of such a high degree of purity that it is suitable for human consumption without refining.

The brown sugar chunk's sucrose content by weight, in the dry state, is 98.9 international sugar degrees, which indicates it is raw sugar. See Subheading Note 1 and Additional U.S. Note 1 to Chapter 17, HTSUSA, Sugar and Sugar Confectionery. Also, the addition of a dark or caramelized syrup to the brown sugar is not considered an added coloring or flavoring since such sugar cane products are provided for in Chapter 17, and they are products commonly added to refined sugar in order to produce brown sugar. The product is classifiable, at the six digit level, in subheading 1701.11.

Insofar as the product is described in, and entered pursuant to, Additional U.S. Note 3(a) and 3(b) to Chapter 17 (Notes 3(a) and 3(b)), and is not further refined or improved in quality, it is classifiable in subheading 1701.11.0125. If the product is not entered pursuant to Notes 3(a) and 3(b), and is not further refined or improved in quality, it is classifiable in subheading 1701.11.0325.

The white sugar chunk's sucrose content by weight, in the dry state, is 99.7 international sugar degrees, which indicates it is not raw sugar. Since the product does not contain added coloring or flavoring, it is classifiable, at the six digit level, in subheading 1701.99. Insofar as the product is described in, and entered pursuant to, Additional U.S. Note 3(a) and 3(b) to Chapter 17 (Notes 3(a) and 3(b)), and is not further refined or improved in quality, it is classifiable in subheading 1701.99.0125. If the product is not entered pursuant to Notes 3(a) and 3(b), and is not further refined or improved in quality, it is classifiable in subheading 1701.99.0225.

Since neither Title II of the Sugar Act of 1948, nor substantially equivalent legislation is presently in effect, the products remain subject to the currently applicable HTSUSA duty rates. See Additional U.S. Note 2 to Chapter 17.

Country of Origin - Substantial Transformation

When addressing the issue of substantial transformation, we must question whether the refining operations performed on the sugar in the country of exportation, that is France, are of such a substantial nature as to justify the conclusion that the resulting product is a manufacture of that country.

See Headquarters' Ruling Letter 082033, issued September 5, 1989. In general, a substantial transformation occurs when an article emerges from a process with a new name, character or use different from that possessed by the article prior to processing. See Texas Instruments, Inc. v. United States, 69 CCPA 152, 681 F.2d 778 (1982); See also Superior Wire v. U.S., 11 CIT 608 (1987), 669 F. Supp. 472, aff'd. 867 F.2d 1409 (1989).

In HRL 082033, Customs determined that the refining of raw sugar would not substantially transform the product, since the refining process did not change the essential character of the raw sugar and make it into a new article with a new name, character, or use. Customs explained that:

> [t]he refining process does not change the product's intended use, which is dictated by the very nature of the product—the raw sugar with its desired sucrose.

The raw sugar already possesses the qualities sought after in sugar (its sweetness and nutriousness).

These are not the result of the refining process. While the refining of sugar changes its color and increases its purity, . . . the refining process is not necessary to obtain its essential qualities. Refining cane sugar upgrades and purifies the sugar, but it does not change the essential character of the product.

In this case, since the refining of the raw sugar in France is not a substantial transformation, the sugar remains a product of Swaziland for country of origin and quota purposes.

Importation Restrictions

Certain requirements must be met in order for the product to be entered pursuant to Notes 3(a) and 3(b) and thus be classified in subheading 1701.11.0125 or 1701.99.0125. Note 3(a) provides, in pertinent part, that the total amount of sugar entered under subheading 1701.11.01 and 1701.99.01, shall not exceed, in the aggregate, an amount established by the Secretary of Agriculture (Secretary). This total amount consists of (1) a base quota amount, (2) a quota adjustment amount and (3) an amount reserved for the importation of specialty sugars. Modifications of such quantitative limitations and authorization to charge sugar entering the U.S. to a previous or subsequent quota period are subject to the Secretary's approval.

Note 3(b) explains, in pertinent part, that sugar imported from Swaziland, and classifiable in subheading 1701.11.01 or 1701.99.01, is allocated 1.6 percent of the total base quota amount for certain sugars, syrups and molasses to be imported from the various supplying countries and areas listed in Note 3(b)(i). The United States Trade Representative presently requires that certificates of eligibility accompany such imported sugar.

HOLDING:

"A la Perruche" brown sugar chunks, entered pursuant to Notes 3(a) and 3(b), and not to be further refined or improved in quality, are classifiable in subheading 1701.11.0125. The general column one rate of duty is 1.4606 cents per kilogram less O.020668 cents per kilogram for each degree under 100 degrees (and fractions of a degree in proportion) but not less than 0.943854 cents.

If not entered pursuant to Notes 3(a) and 3(b), and not to be further refined or improved in quality, the brown sugar chunks are classifiable in subheading 1701.11.0325. The general column one rate of duty is 37.386 cents

per kilogram less 0.529 cents per kilogram for each degree under 100 degrees (and fractions of a degree in proportion) but not less than 24.161 cents per kilogram.

"A la Perruche" white sugar chunks, entered pursuant to Notes 3(a) and 3(b), and not to be further refined or improved in quality, are classifiable in subheading 1701.99.0125. The general column one rate of duty is 1.4606 cents per kilogram less 0.020668 cents per kilogram for each degree under 100 degrees (and fractions of a degree in proportion) but not less than 0.943854 cents.

If not entered pursuant to Notes 3(a) and 3(b), and not to be further refined or improved in quality, the white sugar chunks are classifiable in subheading 1701.99.0225. The general column one rate of duty is 37.386 cents per kilogram less 0.529 cents per kilogram for each degree under 100 degrees (and fractions of a degree in proportion) but not less than 24.161 cents per kilogram.

We note that a product, from Swaziland, classified in either 1701.11.0125 or 1701.99.0125 is eligible for duty free treatment under the Generalized System of Preferences (GSP), provided it meets the requirements of General Note 3(c)(ii), HTSUSA.

In addition, subheading 9904.40.20 provides that, in any event, the product carries a supplemental agricultural import fee of 2.2 cents per kilogram, but not in excess of 50 percent.

In order to determine which, if any, quantitative limitations or regulations apply when importing your product, we suggest you contact:

Foreign Agricultural Service U.S. Dept. of Agriculture-Room 5531 Import Policies & Trade Analysis Division Washington, D.C. 20250–1000 (202) 720–5676

JOHN DURANT,
*Director,*
*Commercial Rulings Division.*

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
**HQ 967303**
**CLA–2** RR:CTF:TCM 967303 KBR
**CATEGORY:** Classification
**TARIFF NO.:** 1701.91.1000

SIMEON M. KRIESBERG, ESQ.
*1909 K Street, N.W.*
*Washington, D.C. 20006–1101*

**RE:** Modification of HQ 952419; A La Perruche Sugar Chunks

DEAR MR. KRIESBERG:

This is in reference to HQ 952419, issued to you, on behalf of you client Bri-Al, Inc., by the U.S. Customs Service (now Customs and Border Protection ("CBP")), on October 15, 1992. That ruling concerned the classification of A La Perruche white and brown sugar chunks under the Harmonized Tar-

iff Schedule of the United States Annotated (HTSUSA). In HQ 952419, we determined that caramel added to brown sugar chunks was not added coloring and, therefore, the brown sugar chunks were classified in subheading 1701.11.0125, HTSUSA, as "Cane or beet sugar and chemically pure sucrose, in solid form: Raw sugar not containing added flavoring or coloring matter: Cane sugar." We have reviewed HQ 952419 and determined that the classification provided for the brown sugar chunks is incorrect. Classification of the white sugar chunks was correctly stated in HQ 952419 and will not be addressed here.

**FACTS:**

The article consists of brown and white irregularly shaped sugar chunks sold under the name "A La Perruche". The sugar chunks are created by first taking raw sugar and refining it through filtration, crystallization and maturation until the sugar agglomerates into bars. The brown sugar is produced by adding caramelized syrup made from the cane sugar during refining. The bars are broken into irregular lumps and are packaged into boxes which are imported into the United States for retail sale. You stated that the brown sugar has a polarity of 98.9 degrees. You also stated that the Department of Agriculture does not consider this product to be "Specialty Sugar" as defined in 15 C.F.R. § 2011.202(j).

**ISSUES:**

Whether the caramel added to the sugar chunks is considered coloring matter?

**LAW AND ANALYSIS:**

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). Under GRI 1, merchandise is classifiable according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In interpreting the headings and subheadings, CBP looks to the Harmonized Commodity Description and Coding System Explanatory Notes (EN). Although not legally binding, they provide a commentary on the scope of each heading of the HTSUSA. It is CBP's practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUSA. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUSA provisions under consideration are as follows:

| | | |
|---|---|---|
| 1701 | | Cane or beet sugar and chemically pure sucrose, in solid form: |
| | | Raw sugar not containing added flavoring or coloring matter: |
| 1701.11 | | Cane sugar: |

* * * * *

| | |
|---|---|
| 1701.11.1000 | Described in additional U.S. note 5 to this chapter and entered pursuant to its provisions. |
| * * * * * | |
| Other: | |
| 1701.91 | Containing added flavoring or coloring matter: |
| | Containing added coloring but not containing added flavoring matter: |
| * * * * * | |
| 1701.91.1000 | Described in additional U.S. note 5 to this chapter and entered pursuant to its provisions. |
| 1701.91.3000 | Other. |
| * * * * * | |
| 1701.99 | Other: |
| * * * * * | |
| 1701.99.10 | Described in additional U.S. note 5 to this chapter and entered pursuant to its provisions. |

At issue is the classification of brown sugar chunks. The sugar forming the chunks have caramelized sugar syrup added to change the color to a brown or amber shade.

Heading 1701 provides for cane or beet sugar and chemically pure sucrose, in solid form. The EN's to 1701 provide, in pertinent part that, "**Cane sugar** is derived from the juices of the sugar cane stalk." As the sugar chunks fit this description, they are classifiable in heading 1701.

At the six digit subheading level, 1701.11 provides for raw cane or beet sugar, not containing added flavoring or coloring matter, while 1701.91 provides for other cane and beet sugar, containing added coloring but not containing added flavoring matter and 1701.99 provides for other cane or beet sugar, other.

The Subheading Note 1 to Chapter 17 states that:

> For the purposes of subheadings 1701.11 and 1701.12, "raw sugar" means sugar whose content of sucrose by weight, in the dry state, corresponds to a polarimeter reading of less than 99.5 degrees.

The EN's to 1701 indicate that:

> **Raw** or crude cane or beet sugars occur in the form of brown crystals, the colour being due to the presence of impurities. Their sucrose content by weight, in the dry state, corresponds to a polarimeter reading of less than 99.5° . . . . They are generally destined for processing into refined sugar products. Raw sugar may, however, be of such a high degree of purity that it is suitable for human consumption without refining.
>
> **Refined** cane or beet sugars are produced by the further processing of raw sugar. They are generally produced as a white crystalline substance

> which is marketed in various degrees of fineness or in the form of small cubes, loaves, slabs, or sticks or regularly moulded, sawn or cut pieces.
>
> In addition to the raw or refined sugars mentioned above, this heading covers brown sugar consisting of white sugar mixed with small quantities of, e.g. caramel or molasses, and sugar candy consisting of large crystals produced by slow crystallization of concentrated solutions of sugar.

* * * * *

The instant A La Perruche brown sugar chunks' sucrose content by weight, in the dry state, is 98.9 international sugar degrees. HQ 952419, citing Subheading Note 1 and Additional U.S. Note 1 to Chapter 17, HTSUSA, found that this indicated the product was raw sugar. We agree. However, in HQ 952419, because the caramelized syrup is itself a sugar product and it is commonly added to refined sugar in order to produce brown sugar, CBP found that the addition of caramelized syrup to the sugar was not considered adding coloring or flavoring. We disagree that the addition of the caramelized syrup is not added coloring.

The purpose of adding the caramelized syrup is to change the color of the sugar. Further, this issue was considered by the Harmonized System Committee of the World Customs Organization. In NC0728E1 (HSC/31) in November 2003 (Annex F/8 to Doc. NCO796E2), the Harmonized System Committee decided that the addition of a small quantity of caramel to produce brown sugar chunks was adding a coloring matter. Therefore, the Harmonized System Committee issued a Compendium of Classification Opinion which classified the brown sugar chunks under consideration in subheading 1701.91, HTSUSA. *See* HSC/33 Doc. NC0845B2, Annex M/5, May 2004.

As stated in T.D. 89–80, decisions in the Compendium of Classification Opinions should be treated in the same manner as the EN's, *i.e.*, while neither legally binding nor dispositive, they provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. T.D. 89–80 further states that EN's and decisions in the Compendium of Classification Opinions "should receive considerable weight." *See* HQ 966328 (March 31, 2003). Therefore, because we find the caramelized syrup to be added coloring and because we find the Harmonized System Committee decision informative, we hold that the A La Perruche brown sugar chunks are classified in subheading 1701.91, HTSUSA, as "Cane or beet sugar and chemically pure sucrose, in solid form: Other: Containing added flavoring or coloring matter".

**HOLDING:**

In accordance with the above discussion, the A La Perruche brown sugar chunks are classified in heading 1701, specifically in subheading 1701.91, HTSUSA, as "Cane or beet sugar and chemically pure sucrose, in solid form: Other: Containing added flavoring or coloring matter". If the A La Perruche brown sugar chunks are as described in additional U.S. note 5 to Chapter 17 and entered pursuant to its provisions, the specific classification will be as subheading 1701.91.1000, HTSUSA, which provides for "Cane or beet sugar and chemically pure sucrose, in solid form: Other: Containing added flavoring or coloring matter: Containing added coloring but not containing added flavoring matter: Described in additional U.S. note 5 to this chapter and entered pursuant to its provisions." The 2006 column one, general rate of duty is 3.6606 cents per kilogram less 0.020668 cents per kilogram for each de-

gree under 100 degrees (and fractions of a degree in proportion) but not less than 3.143854 cents per kilogram. If not described in additional note 5 to Chapter 17 and not entered pursuant to its provisions, the applicable classification will be in subheading 1701.91.3000, HTSUSA, as "Cane or beet sugar and chemically pure sucrose, in solid form: Other: Containing added flavoring or coloring matter: Containing added coloring but not containing added flavoring matter: Other." The 2006 column one, general rate of duty is 35.74 cents per kilogram. In addition, products classified under subheading 1701.91.3000, HTSUSA, may be subject to additional duties based on their value as described in subheadings 9904.17.08 to 9904.17.16, HTSUSA. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov/tata/hts.

**EFFECT ON OTHER RULINGS:**

HQ 952419 dated October 15, 1992, is **modified** as to the classification under the HTSUSA of the A LA Perruche brown sugar chunks.

MYLES B. HARMON,
*Director,*
*Commercial and Trade Facilitation Division.*

## 19 CFR PART 177

## MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN "SNAPPIN' SLAP BRACELETS"

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of modification of a ruling letter and revocation of treatment relating to the tariff classification of certain "Snappin' Slap Bracelets" under the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA").

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection ("CBP") is modifying a ruling concerning the tariff classification of, among other things, certain "Snappin' Slap Bracelets" and is revoking any treatment CBP has previously accorded to substantially identical transactions. Notice of the proposed modification was published on November 23, 2005, in Vol. 39, No. 48 of the *Customs Bulletin*. No comments were received in response to the notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after March 26, 2006.

**FOR FURTHER INFORMATION CONTACT:** Andrew M. Langreich, Tariff Classification and Marking Branch: (202) 572–8776.

**SUPPLEMENTARY INFORMATION:**

Background

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two concepts that emerged from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to CBP's obligations, notice proposing to modify New York Ruling Letter ("NY") K82999, dated March 2, 2004, as it pertains to the classification of certain "Snappin' Slap Bracelets," was published on November 23, 2005, in Vol. 39, No. 48 of the *Customs Bulletin*. No comments were received in response to this notice.

As stated in the proposed notice, the modification action will cover any rulings on this merchandise that may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings other than those herein identified; no further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. §1625(c)(2)), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should

have advised CBP during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice, may raise the rebuttable presumption of lack of reasonable care on the part of the importers or their agents for importations of merchandise subsequent to the effective date of this final decision.

In NY K82999, merchandise described as "Snappin' Slap Bracelets" (textile covered metal bracelets that are snapped around the wrist), among other things, were classified under subheading 9503.70.0000, HTSUSA, which provides for other toys, put up in sets or outfits, and parts and accessories thereof. We have reconsidered that determination and now consider the articles to be described *eo nomine* under the tariff as imitation jewelry classifiable under heading 7117, HTSUS, pursuant to the analysis in Headquarters Ruling Letter ("HQ") 967932.

Pursuant to 19 U.S.C. §1625(c)(1), CBP is modifying NY K82999 as it pertains to the tariff classification of certain "Snappin' Slap Bracelets," and any other ruling not specifically identified, to reflect the proper classification of the merchandise under heading 7117, specifically, subheading 7117.19.9000, HTSUSA, which provides for "Imitation jewelry: Of base metal, whether or not plated with precious metal: Other: Other: Other" pursuant to the analysis set forth in HQ 967932, set forth as the attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective sixty (60) days after its publication in the *Customs Bulletin*.

**Dated:** January 10, 2006

Gail A. Hamill for MYLES B. HARMON,
*Director,*
*Commercial and Trade Facilitation Division.*

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967932
January 10, 2006
CLA–2 RR:CTF:TCM 967932 AML
**CATEGORY:** Classification
**TARIFF NO.:** 7117.19.9000

BARBARA Y. WIERBICKI
TOMPKINS & DAVIDSON, LLP
*One Astor Plaza*
*1515 Broadway*
*New York, NY 10036–8901*

**RE:** "Snappin' Slap Bracelets"; NY K82999 modified

DEAR MS. WIERBICKI:

This letter is in regard to New York Ruling Letter ("NY") K82999, dated March 2, 2004, which was issued to you on behalf of Tara Toy Corporation by the National Commodity Specialist Division, concerning the tariff classification of, among other things, "Snappin' Slap Bracelets" under the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"). In NY K82999, the "Snappin' Slap Bracelets" were classified under subheading 9503.70.0000, HTSUSA, which provides for "other toys . . . : other toys, put up in sets or outfits, and parts and accessories thereof." We have reconsidered the classification of the "Snappin' Slap Bracelets" and determined that it is incorrect. This letter sets forth the correct classification of those articles. The classification of the other articles considered in NY K82999 remains unchanged.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186 (1993)), notice of the proposed modification was published on November 23, 2005, in Vol. 39, No. 48 of the *Customs Bulletin*. No comments were received in response to the notice.

**FACTS:**

In NY K82999, we described the "Snappin' Slap Bracelets" as follows:

> The first, Snappin' Slap Bracelets, consists of two bracelets bases and stickers, bracelet strips, slide-ons, charms and markers which are used to create, decorate and change the appearance of the bracelets.

All of these components are packaged as a set for retail sale, and on the package are detailed instructions on how to assemble (insert the metal into the textile sleeve) and decorate (glue cutouts to the textile sleeves) the articles with the included supplies to prepare them to be snapped upon the wrist and worn as personal adornment.

**ISSUE:**

Whether the "Snappin' Slap Bracelets" are classifiable as imitation jewelry under heading 7117, HTSUS, or as toys under heading 9503, HTSUS?

**LAW AND ANALYSIS:**

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States ("HTSUS") in accordance with the General Rules of Interpretation ("GRIs"). GRI 1provides that classification shall be determined ac-

cording to the terms of the headings and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, the remaining GRIs may be applied.

The Harmonized Commodity Description And Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise. U.S. Customs and Border Protection ("CBP") believes the ENs should always be consulted. See T.D. 89–80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

The HTSUS provisions under consideration are as follows:

| | |
|---|---|
| 7117 | Imitation jewelry: |
| | Of base metal, whether or not plated with precious metal: |
| 7117.19 | Other: |
| | Other: |
| 7117.19.90 | Other. |
| | * * * |
| 9503 | Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof: |
| 9503.70.00 | Other toys, put up in sets or outfits, and parts and accessories thereof. |

The ENs to heading 9503, HTSUS, provide, in pertinent part, that:

> This heading covers toys intended essentially for the amusement of persons (children or adults) . . . The heading includes:
>
> (A) All toys not included in headings 95.01 and 95.02. Many of the toys of this heading are mechanically or electrically operated.
>
> These include:
>
> * * *
>
> (17) Educational toys (*e.g.*, toy chemistry, printing, sewing and knitting sets).
>
> * * *
>
> Collections of articles, the individual items of which if presented separately would be classified in other headings in the Nomenclature, are classified in this Chapter when they are put up in a form clearly indicating their use as toys (*e.g.*, instructional toys such as chemistry, sewing, etc., sets).
>
> * * *

In *Minnetonka Brands Inc. v. United States*, 110 F. Supp. 1020 (CIT 2000), the court stated in regard to the scope of heading 9503, HTSUS, at 1026–7 that:

Because heading 9503 is, in relevant part, a principal use provision, classification under this provision is controlled by the principal use "of goods of that class or kind to which the imported goods belong" in the United States at or immediately prior to the date of importation. ARI 1(a) (emphasis added); *see Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1365 (Fed. Cir. 1999) (construing ARI 1(a) as "calling for a determination as to the group of goods that are [**1027] commercially fungible with the imported goods"); *Group Italglass U.S.A., Inc. v. United States*, 17 C.I.T. 1177, 1177, 839 F. Supp. 866, 867 (1993) (stressing "that it is the principal use of the class or kind of goods to which the imports belonged" at or immediately prior to the dates of importation, "and not the principal use of the specific imports[,] that is controlling under the Rules of Interpretation"). "Principal use" is defined as the use "which exceeds any other single use of the article." Conversion of the Tariff Schedules of the United States Annotated Into the Nomenclature Structure of the Harmonized System: Submitting Report at 34–35 (USITC Pub. No. 1400) (June 1983).

*Minnetonka* continues at 1027:

To determine whether the subject imports are of the "class or kind" of merchandise whose principal use is amusement, diversion or play, as Plaintiff claims, or the conveyance or packaging of goods, as Defendant claims, the court examines all pertinent circumstances. *United States v. Carborundum Co.*, 63 C.C.P.A. 98, 102, 536 F.2d 373, 377 (1976). Factors which have been considered in making this determination include (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels, class or kind of trade in which the merchandise moves; (4) the environment of the sale (*i.e.*, accompanying accessories and the manner in which the merchandise is advertised and displayed); (5) usage, if any, in the same manner as merchandise which defines the class; (6) the economic practicality of so using the import; and (7) the recognition in the trade of the use. *Id.*; see, *e.g., United States v. Border Brokerage Co., Inc.*, 706 F.2d 1579, 1582 (Fed. Cir. 1983); *Hartz Mountain Corp. v. United States*, 19 C.I.T. 1149, 1151, 903 F. Supp. 57, 59–60 (1995); *Kraft, Inc. v. United States*, 16 C.I.T. 483, 489 (1992) (applying *Carborundum* factors). "Susceptibility, capability, adequacy, or adaptability of the import to the common use of the class is not controlling." *Carborundum*, 63 C.C.P.A. at 102, 536 F.2d at 377.

Application of the *Carborundum* factors to the articles at issue yields the following results:

(1) The general physical characteristics of the merchandise: slap bracelets are ultimately designed and intended to be worn as articles of personal adornment. Once the purchaser decides the bracelets are sufficiently decorated, exhausts the decorations provided with the bracelets, decides not to use the decorations, or loses or has no interest in decorating the slap bracelets, the articles can be worn on the wrist to adorn the person.

(2) The expectation of the ultimate purchasers: to wear an article of personal adornment on the wrist.

(3) The channels, class or kind of trade in which the merchandise moves: the articles are designed for children.

(4) The environment of the sale (*i.e.*, accompanying accessories and the manner in which the merchandise is advertised and displayed): the package depicts seven decorated bracelets (contracted into the shape of a bracelet and a girl "holding" an illustration of the bracelet being snapped around her wrist. We reiterate the finite nature of the act of decorating (exhaustion of supplies, etc.) described in the discussion of *Carborundum* factor 1 above.

(5) Usage, if any, in the same manner as merchandise which defines the class: the amusing use of decoration is finite whereas the use as imitation jewelry lasts as long as the materials or the interest of the wearer last.

(6) The economic practicality of so using the import: the adorning feature of the bracelets imparts the value of the articles.

(7) The recognition in the trade of the use: Snap bracelets are intended to be trendy articles of personal adornment.

The application of the *Carborundum* factors indicates that the articles of a class or kind intended for use as articles of personal adornment, rather than as educational toy sets. While the child can decorate and personalize the snap bracelets, any amusement value provided by the decoration of the bracelets is finite. That is, once the bracelet is decorated to the degree deemed appropriate by the child, the playful characteristic ends. Further, the amusement of decorating is the means to the end — wearing a snap bracelet. The activity of decorating what could be worn as a bracelet does not constitute emulative or educational play; gluing and such are creative activities at best. Thus, we conclude that the "slap bracelets" are not educational toy sets.

Heading 7117 provides for "imitation jewelry". Imitation jewelry is defined in Note 11, Chapter 71 as:

> Articles of jewelry within the meaning of paragraph (a) of note 9, not incorporating natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed) nor (except as plating or as minor constituents) precious metal or metal clad with precious metal.

Articles of jewelry are described in Note 9 to Chapter 71, in pertinent part, as follows:

> a) Any small objects of personal adornment (gem-set or not) (for example, rings, bracelets, necklaces, brooches, earrings, watch chains, fobs, pendants, tie pins, cuff links, dress studs, religious or other medals and insignia).

The subject articles comprise articles of jewelry; small articles of personal adornment, within the meaning of Note 9 to Chapter 71. They also meet the terms of Note 11 of Chapter 71, as articles of imitation jewelry. Therefore, the snap bracelets are provided for *eo nomine* in heading 7117.

This conclusion comports with that made in several prior rulings: NY L83505, dated March 24, 2005; HQ 088222, dated February 15, 1991 and HQ 088126, dated January 10, 1991. See also NY I85472, dated August 28,

2002 and HQ 082736, dated March 20, 1990, which classified "paper craft" and "crochet and knitting" kits, respectively, outside of heading 9503, HTSUS.

We are cognizant that rulings exist in which beading kits and the like are classified as toys or toy sets under heading 9503, HTSUS. See, for example, the Foam Purse Assortment and the Magically Magnetic Hair Styling Set in the subject ruling. See too Headquarters Ruling Letter 959401, dated April 14, 1997. Those articles are distinguishable because the child creates the entire article (be it necklace, bracelet, etc.) rather than merely decorating an existing snap bracelet.

**HOLDING:**

At GRI 1, the "Snappin' Slap Bracelets" are classified under heading 7117, specifically under subheading 7117.19.9000, HTSUSA, which provides for "Imitation jewelry: Of base metal, whether or not plated with precious metal: Other: Other: Other". The 2005 general, column rate of duty is 11% *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at *www.usitc.gov.*

**EFFECT ON OTHER RULINGS:**

NY K82999 dated March 2, 2004 is hereby modified as it pertains to the classification of "Snappin' Slap Bracelets." In accordance with 19 U.S.C. §1625 (c)(2), this ruling will become effective sixty (60) days after its publication in the *Customs Bulletin*.

Gail A. Hamill for MYLES B. HARMON,
*Director,*
*Commercial and Trade Facilitation Division.*

cc: National Commodity Specialist Division
NIS Wong
NIS Mushinske

# United States Court of International Trade

One Federal Plaza
New York, NY 10278

*Chief Judge*

Jane A. Restani

*Judges*

Gregory W. Carman
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

*Clerk*

Leo M. Gordon

# Decisions of the United States Court of International Trade

**Slip Op. 06–2**

EURODIF S.A., COMPAGNIE GÉNÉRALE DES MATIÉRES NUCLÉAIRES, AND COGEMA, INC., *ET AL.*, Plaintiffs, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Consol. Ct. No. 02–00219

***ORDER FOR REMAND***

In accordance with the decisions of the United States Court of Appeals for the Federal Circuit in *Eurodif S.A. v. United States*, 411 F.3d 1355(Fed. Cir. 2005) ("*Eurodif I*") and *Eurodif S.A. v. United States*, 423 F.3d 1275(Fed. Cir. 2005) ("*Eurodif II*"), and upon consideration of the parties' filings herein, it is hereby:

**ORDERED** that the final determination and issuance of an antidumping duty order by the United States Department of Commerce ("Commerce") in *Low Enriched Uranium from France*, 66 Fed. Reg. 65,877 (Dep't Commerce Dec. 21, 2001)(notice of final affirmative antidumping duty determination) *as amended*, 66 Fed. Reg. 6680 (Dep't Commerce Feb. 13, 2002)(notice of amended final determination of antidumping duty order), challenged in Consolidated Court No. 02–00219, is remanded to Commerce for action consistent with the decisions of the Court of Appeals for the Federal Circuit in *Eurodif I and II*.

**ORDERED** that Commerce upon remand shall revise such final determination and order in accordance with the decisions in *Eurodif I and II*. Commerce shall specifically explain how its final determination and order on remand has eliminated all SWU transactions as required by *Eurodif I and II*.

**ORDERED** that Commerce shall file its remand results in Consolidated Court No. 02–00219 with the Court, and serve the parties with same, by **March 3, 2006.** All parties may file and serve responses thereto by **March 17, 2006** thereafter. All parties may file and serve a reply to any responses by **March 31, 2006**; and it is further

**ORDERED** that all other action in Consolidated Court No. 02–00219 before this Court is stayed pending further notice from the Court.

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**Slip Op. 06–3**

EURODIF S.A., COMPAGNIE GÉNÉRALE DES MATIÉRES NUCLÉAIRES, AND COGEMA, INC., *ET AL.*, Plaintiffs, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Consol. Ct. No. 02–00221

***ORDER FOR REMAND***

In accordance with the decisions of the United States Court of Appeals for the Federal Circuit in *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005) ("*Eurodif I*") and *Eurodif S.A. v. United States*, 423 F.3d 1275 (Fed. Cir. 2005) ("*Eurodif II*"), and upon consideration of the parties' filings herein, it is hereby:

**ORDERED** that the final determination and issuance of a countervailing duty order by the United States Department of Commerce ("Commerce") in *Low Enriched Uranium from France*, 66 Fed. Reg. 65,901 (Dep't Commerce Dec. 21, 2001)(notice of final affirmative countervailing duty determination) *as amended*, 67 Fed. Reg. 6689 (Dep't Commerce Feb. 13, 2002)(notice of amended final determination of countervailing duty order), challenged in Consolidated Court No. 02–00221, is remanded to Commerce for action consistent with the decisions of the Court of Appeals for the Federal Circuit in *Eurodif I and II*.

**ORDERED** that Commerce upon remand shall revise such final determination and order in accordance with the decisions in *Eurodif I and II*. Commerce shall specifically explain how its final determination and order on remand has eliminated all SWU transactions as required by *Eurodif I and II*.

**ORDERED** that Commerce shall file its remand results in Consolidated Court No. 02–00221 with the Court, and serve the parties with same, by **March 3, 2006.** All parties may file and serve responses thereto by **March 17, 2006** thereafter. All parties may file and serve a reply to any responses by **March 31, 2006**; and it is further

**ORDERED** that all other action in Consolidated Court No. 02–00221 before this Court is stayed pending further notice from the Court.

Slip Op. 06–4

OLYMPIA INDUSTRIAL, INC., Plaintiff, v. UNITED STATES, Defendant, and AMES TRUE TEMPER, Def.-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 04–00647

## *MEMORANDUM OPINION*

[Plaintiff's motion for a preliminary injunction denied]

Dated: January 6, 2006

*Hume & Associates, PC* (*Robert T. Hume*, *Akil Vohra*, and *Jon C. Cooper*), for plaintiff.

*Peter D. Keisler*, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen Carl Tosini*), for defendant.

*Wiley, Rein & Fielding, LLP* (*Charles Owen Verrill, Jr.* and *Timothy C. Brightbill*), for defendant-intervenor.

Eaton, Judge: This matter is before the court on the motion of plaintiff Olympia Industrial, Inc. ("plaintiff" or "Olympia") for a preliminary injunction pursuant to USCIT Rule 65(a). By its motion, plaintiff seeks "to enjoin the Defendant, the United States, as well as the United States Department of Commerce ("Commerce") . . ., and the United States Customs and Border Protection . . ., from imposing certain cash deposit rates on future imports of the MUTT®, (Multi-Use Tough Tools), a scraper, imported by the Plaintiff, that are included in the antidumping orders on heavy forged hand tools, finished or unfinished, with or without handles, from the People's Republic of China ("HFHTs")." Pl.'s Mot. for Temporary Restraining Order and Prelim. Injunction at 1–2 ("Pl.'s Br."). Plaintiff seeks injunctive relief pending the outcome of this court's review of Commerce's Final Scope Ruling of Dec. 9, 2004. *See* Pub. Doc. 13 (not published in the Federal Register). Defendant United States ("defendant") opposes the motion, as does Defendant-Intervenor Ames True Temper ("Ames").

On October 25, 2005, this court granted plaintiff's request for a temporary restraining order ("TRO"), which enjoined defendant and the United States Department of Customs and Border Protection ("Customs") from "requiring the payment of, or otherwise collecting antidumping cash deposits on any entry of axes/adzes . . . more specifically, of the MUTTs®, . . . at any rate other than what would preserve the status quo, namely ZERO," until October 28, 2005, the date of the evidentiary hearing on the instant preliminary injunction motion. *See* Order of 10/25/2005 (emphasis in original). Following the evidentiary hearing, the court did not extend the TRO and reserved judgment on the motion for a preliminary injunction. Jurisdiction

lies under 19 U.S.C. § 1516a(c)(2) (2000). For the following reasons, the court denies plaintiff's motion for a preliminary injunction.

## BACKGROUND AND STANDARD OF REVIEW

This motion differs from those most often seen by this Court because plaintiff does not seek to enjoin liquidation of its merchandise during the pendency of the underlying action.[1] Rather, plaintiff asks the court to enjoin the collection of cash deposits pending this court's review of Commerce's Final Scope Ruling. This ruling found plaintiff's product, the MUTT®, was within the scope of the heavy forged hand tools antidumping duty order. *See* Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China, 70 Fed. Reg. 54,897 (September 19, 2005) ("Final Results"). As a result of that ruling, starting on September 19, 2005, the date of publication of the Final Results in the Federal Register, entries of the MUTTs® have been subject to a cash deposit requirement of 174.5% of their entered value. The collection of the cash deposit upon Commerce's issuance of its final affirmative determination is authorized by 19 C.F.R. § 351.211(a), which states that "importers no longer may post bonds as security for antidumping . . . duties, but instead must make a cash deposit of estimated duties." Pursuant to this provision, "when an antidumping order is published [in the Federal Register], importers normally must begin to make a cash deposit of estimated antidumping duties upon the entry of subject merchandise." 19 C.F.R. § 351.215(a).

In seeking the extraordinary remedy of a preliminary injunction,[2] plaintiff claims to have borne the burden of satisfying each part of the familiar four-part test. That is, to obtain the extraordinary relief of an injunction prior to trial, the movant carries the burden of establishing: (1) that it will suffer irreparable harm if preliminary relief is not granted; (2) that the public interest would be better served by the relief requested; (3) that the balance of the hardships tips in the movant's favor; and (4) that the movant is likely to succeed on

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[1] Liquidation is the "final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. § 159.1 (2000); *see also Ammex, Inc. v. United States*, 419 F.3d 1342, 1345 n.1 (Fed. Cir. 2005). As a general rule, the United States consents to motions to enjoin liquidation of entries covered by antidumping administrative reviews during the pendency of actions. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 808 (Fed. Cir. 1983) (noting that, upon Zenith's motion, "[t]he government agreed not to liquidate the subject entries until the trial court could rule on the request for a preliminary injunction."). Here, if liquidation were enjoined, plaintiff would make the required cash deposits but, should it prevail on the merits, the cash deposits would be returned with interest. *See* 19 U.S.C. § 1505(b) ("The Customs Service shall collect any increased or additional duties and fees due, together with interest thereon, or *refund* any excess moneys deposited, together with interest thereon . . . .") (emphasis added).

[2] This court recognizes that "[a] preliminary injunction is extraordinary relief that is available only on a special showing of need for relief *pendente lite*. . . ." *MercExchange, LLC v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005).

the merits at trial. *See FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993) (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983)). The court will address each part of the test in turn.

## DISCUSSION

### I. Irreparable Harm

Plaintiff claims that it will suffer immediate and irreparable harm if Customs' collection of the cash deposit is not enjoined because of the economic hardship that would result from its payment.[3] *See Shandong Huarong Gen. Group v. United States*, 24 CIT 1286, 1288, 122 F. Supp. 2d 143, 145 (2000). Generally, when analyzing the necessity for a preliminary injunction, "[t]he crucial factor is irreparable injury." *Corus Group PLC v. Bush*, 26 CIT 937, 942, 217 F. Supp. 2d 1347, 1354 (2002) (citing *Elkem Metals Co. v. United States*, 25 CIT 186, 190, 135 F. Supp. 2d 1324, 1329 (2001)).

At the evidentiary hearing, plaintiff called two witnesses, Randal L. Wright, its Senior Vice President of operations, and John Mackin, Vice President of its lawn and garden division. Each was called to substantiate the claim that the plaintiff was unable to make the required cash deposit and would, therefore, be prevented from importing the MUTT® and having it in its sales inventory. The witnesses were also called to testify as to the economic harm to plaintiff that would result from its inability to advertise and sell the MUTT® and that such harm would be immediate and irreparable. Each witness was subject to cross examination. Mr. Wright testified that Olympia had a total of $62 million of sales for all its products in the fiscal year ending on March 1, 2005, *see* Tr. of Civ. Cause for Prelim. Injunction Hearing ("Tr.") at 75:6–8; and that sales of its lawn and garden tools alone amounted to $15 million. Mr. Wright further testified that, of that amount, garden tool sales alone were about $7.8 million and that MUTT® sales made up approximately $1.7 million of that total. *See* Tr. at 92:1–10. For his part, Mr. Mackin testified that the MUTT® was so important to Olympia's sales that, without it as part of its sales inventory, the company would lose sales of approximately $6 million. *See* Tr. at 105–06:21–25, 1–6; 109:4–8 (indicating that a customer who purchases the MUTT® will typically purchase a variety of other tools sold by Olympia).

This Court has twice before addressed the question of enjoining the collection of cash deposits. The first case, *Queen's Flowers de Colombia v. United States*, 20 CIT 1122, 947 F. Supp. 503 (1996), in-

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[3] Plaintiff also argues that inclusion of the trademarked MUTT® in the scope of the antidumping duty order results in selective enforcement of the antidumping laws. However, as plaintiff has produced no evidence indicating how such selective enforcement would result in irreparable harm, the court declines to address this issue.

volved twenty Colombian producers/exporters of fresh cut flowers and three related U.S. importers, who sought a preliminary injunction to prevent the collection of cash deposits. With respect to the issue of whether the plaintiffs faced irreparable harm, the *Queen's Flowers* Court focused on the magnitude[4] and immediacy of plaintiffs' prospective injury. Specifically, the court noted that

> plaintiffs have established that under the new cash deposit rate of 76.60 percent, eight of the twenty companies will go out of business within periods ranging from a few days to a few weeks. . . .
>
> These companies sell an extremely high percentage of their production of the subject merchandise to the United States (all around 80%) and these sales account for a similarly high percentage of their total sales revenue. Also, the product they sell is a perishable good tailored to the unique demands of the United States flower market; alternative markets do not exist in which the companies can sell their excess capacity to stay in business. The new deposit rate is also very high, relative to the rates set . . . in an industry that is so competitive. Thus, collection of the 76.60 deposit rate will force each of the eight companies out of business within an extremely short time period, eliminating their opportunity for future corrective judicial relief.

*Id.* at 1125–26, 947 F. Supp. at 506–07 (footnotes omitted). Based on these findings, the Court concluded that eight of the plaintiffs had satisfied the requirement that they would suffer irreparable harm in the absence of an injunction. In reaching its conclusion, the Court relied on evidence establishing that paying the antidumping duty deposits would drive the eight flower producers/exporters out of business in an extremely short period of time. *Id.* at 1126, 947 F. Supp. at 507 (stating that the remaining plaintiffs failed to "establish the same level of immediacy of harm that the other eight companies [had]: immediate extinction."). The court then analyzed the remaining three factors and granted plaintiffs their requested relief while "limiting the scope of the injunction affecting the cash deposit rates to the eight companies that established a risk of immediate economic harm . . . ." *Id.* at 1128, 947 F. Supp. at 509.

The second case in which this Court addressed the issue at bar is *Corus Group PLC v. Bush*, 26 CIT 937, 217 F. Supp. 2d 1347. In that

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[4] While the magnitude of the anticipated harm is not an essential element in most cases dealing with irreparable injury, in *Queen's Flowers*, the Court found that the magnitude of the prospective harm was so great that it could not be repaired by future court action. *Cf. CPC Int'l, Inc. v. United States*, 19 CIT 978, 980, 896 F. Supp. 1240, 1243 (1995) ("What is critical is not the magnitude of the injury, but rather its immediacy and the inadequacy of future corrective relief.") (citations omitted) (internal quotation marks omitted).

case, the plaintiff sought a preliminary injunction to enjoin the collection of additional duties imposed on its products pursuant to a Presidential Proclamation. *Id.* at 937, 217 F. Supp. 2d at 1349. At an evidentiary hearing in that case, two witnesses testified that if the duties were collected,

> the [plaintiff's] Norway factory was not sufficiently profitable to attract investment for upgrades that might allow it to produce [new products]. Both witnesses [also] testified that, as a result, the Bergen Plant would have to raise prices or absorb the tariffs. . . . [Plaintiff] argues that sound business principles would require it to close the plant rather than operate at a loss.

*Id.* at 944, 217 F. Supp. 2d at 1355. In denying petitioner's motion for a preliminary injunction, the Court said:

> Every increase in duty rate will necessarily have an adverse affect on foreign producers and importers. That is particularly true with regards to the 30% increase imposed under the safeguard provision. If the court were to find irreparable harm under these facts, the court would likely be required to do so in any challenge to a duty increase because every plaintiff could argue that increased tariffs would cause revenue shortfalls possibly resulting in either operating at a loss or plant closure at some future date. On balance, [plaintiff] has shown that it may suffer an adverse economic impact, but to find irreparable harm here would effectively create a *per se* irreparable harm rule in similar challenges–a result likely contrary to the extraordinary nature of the remedy.

*Id.* (citing *Am. Spring Wire Corp. v. United States*, 7 CIT 2, 6, 578 F. Supp. 1405, 1408 (1984)). Ultimately, the Court found that the plaintiff had not produced sufficient evidence demonstrating that its factory was "in danger of imminent closure." *Id.* In other words, despite having "arguably presented evidence of economic injury," the Court found that plaintiff's evidence failed to exhibit the magnitude and immediacy of injury necessary for finding irreparable harm. *Id.*

While plaintiff in the instant case has demonstrated that it will suffer some economic loss should the demand for cash deposits be enforced, it has not demonstrated either the immediacy or magnitude of the injury petitioners showed in *Queen's Flowers*. Indeed, plaintiff has failed to produce evidence equal to that found wanting in *Corus Group*. First, plaintiff argues that it will be difficult or impossible for it to make the cash deposits because

> we have a weak company that's trying to emerge from a weak position and cash flow is really important to the company at this time to try to maintain [its] operations. The loss of what amounts to over $1 million of cash deposit requirements would make a major difference in [the] cash flow for the company. . . ."

Tr. at 20–21:23–25, 1–3. Thus, plaintiff argues that, as it does not have sufficient funds to make the cash deposit, it will not be able to import the MUTT®.[5] Second, plaintiff argues that should it be unable to import the MUTT®, it will suffer irreparable injury. This argument is difficult to credit. Even if the court were to accept plaintiff's claim that it would lose all of its garden tool sales without the MUTT® in its sales inventory, this would still leave over 90% of its sales intact. Thus, plaintiff has made no showing that, absent the ability to sell the MUTT®, it will immediately fail. Accordingly, the court finds no evidence indicating that plaintiff will face immediate and irreparable injury should the requirement of the cash deposit remain in place.

II. Public Interest

Although the "[f]ailure of an applicant to bear its burden of persuasion on irreparable harm is ground to deny a preliminary injunction [without] conclusively determin[ing] the other criteria," a brief discussion of the remaining three parts of the four-part test is nonetheless useful. *Bomont Indus. v. United States*, 10 CIT 431, 437, 638 F. Supp. 1334, 1340 (1986); *see also Corus Group*, 26 CIT at 942, 217 F. Supp. 2d at 1354. In arguing that the grant of a preliminary injunction will serve the public interest, plaintiff insists:

> It is well settled that the public interest is served by "ensuring that [Commerce] complies with the law, and interprets and applies [the] trade statutes fairly." *See, e.g., Ugine-Savoie Imphy v. United States*, 24 CIT at 1252, 121 F. Supp. 2d at 690. In addition, the "public interest is best served when all parties can obtain effective judicial review." *Int'l Brotherhood of Elec. Workers v. United States*, Slip Op. 05–11 (Jan. 27, 2005) at 16, 2005 Ct. Intl. Trade LEXIS 10, *24, 25 (citations omitted).
>
> In the case at bar, the public interest will be served by this Court's issuance of a temporary restraining order and a preliminary injunction. A temporary restraining order and a preliminary injunction will permit this Court, pursuant to 19 U.S.C. § 1516a(b)(1)(B), to review Commerce's decision to place the MUTT® within the scope of the HFHTs order and to ensure that Commerce's final action in determining the proper antidumping duties and setting cash deposit rates is supported by substantial evidence, and is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Pl.'s Br. at 6–7. Despite plaintiff's argument, the public interest in ensuring that Commerce complies with the trade laws through judi-

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[5] Olympia makes no argument that making the cash deposit will render it insolvent or force it out of business.

cial review would not be advanced by the issuance of its proposed injunction. This court will endeavor to ensure these ends whether an injunction is in place or not. Therefore, plaintiff's argument with respect to the public interest is unconvincing.

The defendant, on the other hand, has a substantial public interest claim. Defendant contends that

> [Customs] is directed to protect the revenue of the United States. *See generally Carolina Tobacco Co., Inc. v. United States*, 402 F.3d 1345 (Fed. Cir. 2005). If an importer does not pay duties upon each entry at the time the entry is made, the importer must post bonds that provide security for the duties owed. 19 U.S.C. § 1623. However, the antidumping duty statute requires that importers post cash deposits of estimated antidumping duties. 19 U.S.C. §§ 1675(a)(1) and 1675(a)(2)(B)(iii).
>
> Accordingly, [in the event an injunction is granted], the revenue would be left unprotected, in clear violation of the express will of Congress.

Def.'s Resp. in Opp'n. to Pl.'s Mot. for a TRO and Prelim. Injunction ("Def.'s Resp.") at 9. In other words, if a preliminary injunction is granted, the public's interest in collecting antidumping revenue may be placed in the kind of jeopardy both the statutes and the regulations are designed to prevent. This is a more than theoretical possibility. Plaintiff has indicated that in the event the court grants the proposed injunction, but defendant prevails on the merits, it will be unable to pay the duties imposed on its merchandise that has already entered the stream of commerce.[6] *See* Tr. at 33–34. This being the case, defendant, not plaintiff, has demonstrated that the public interest would be better served by the requirement of the cash deposit remaining undisturbed.

III. Balance of Hardships

"An inquiry into the balance of hardships requires this Court to determine which party will suffer the greatest adverse effects as a result of the grant or denial of the preliminary injunction." *Ugine-Savoie Imphy v. United States*, 24 CIT 1246, 1250, 121 F. Supp. 2d 684, 688 (2000). Having previously determined that plaintiff will not be irreparably harmed absent an injunction does not settle this part of the four-part test. While not reaching the level of irreparable harm, the court finds that being unable to import the MUTT® would amount to a hardship on plaintiff. In addition, however, the court finds that defendant faces the possibility of enduring a significant

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[6] Counsel suggested that the duties might be satisfied through Commerce's seizure of the "many other goods coming in from China for Olympia . . . ." Tr. at 34:24.

hardship of its own should an injunction be granted, i.e., the previously noted prospect of lost revenue. Here, because both parties face hardship should their arguments with respect to the issuance of an injunction not succeed, the balance of hardships does not aid plaintiff.

IV. Likelihood of Success on the Merits

To this point, plaintiff has not demonstrated immediate and irreparable harm and does not receive assistance from either the public interest or balance of hardship factors. With respect to the likelihood that plaintiff will prevail on its claims in the underlying action, the court finds that both sides have substantial cases. In support of its argument that success on the merits favors the granting of its motion, plaintiff says:

> [Olympia] is likely to succeed on the merits of this case and has raised substantial questions of law. Specifically, there is compelling evidence on the record that the Plaintiff's manufacturing process used in creating the MUTTs®, roll forging, is not hot forging, as specifically stated in the HFHTs order and thus the MUTTs® should not be included within the scope.
>
> [Further], the overriding purpose of the MUTT® is its use as a scraper to facilitate tasks such as scraping, ice breaking, lot clearance, trenching, shingle removal, tile removal, carpet and floor removal, removing ice from a driveway and paint removal. The incidental use of a scraper as a cutting tool does not override the main function of the tool as a scraper, and does not classify the product as having a hewing function. Moreover, the MUTT® is advertised and displayed in a manner different from the tools found in the HFHT order.

Pl.'s Br. at 5 (emphasis omitted) (footnotes omitted) (internal quotation marks omitted).

For its part, defendant relies generally on its brief in the underlying action, which it incorporates by reference. An examination of that brief confirms that defendant has a substantial and serious case. In particular, defendant makes strong arguments both with respect to the kind of forging used to produce the MUTT® and as to its use a hewing tool. *See* Def.'s Resp. to Pl.'s Mot. for J. Upon the Agency Rec. at 10–11 ("[T]he forging process described in the order is illustrative, not exclusive. . . . The critical facts here are that MUTTs® are forged, and the orders cover heavy forged hand tools."); *see also id.* at 12 ("Commerce correctly examined whether MUTTs® are hewing tools similar to axes or adzes.") (emphasis omitted).

Based on the foregoing, the court finds that both parties have presented strong cases,[7] and, thus, plaintiff has failed to demonstrate that it is likely to succeed on the merits at trial. Therefore, this part of the four-part test does not compel the court to find that Olympia is entitled to injunctive relief.

## CONCLUSION

For the reasons stated above, the court denies plaintiff's motion for a preliminary injunction. Judgment shall be entered accordingly.

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[7] As to the exact showing necessary to have this factor favor plaintiff, the present state of the law is unclear. *See U.S. Ass'n of Importers of Textile and Apparel v. United States Dep't of Commerce*, 413 F.3d 1344, 1347 (Fed. Cir. 2005) (finding that, because plaintiff had not even met a minimal threshold for establishing likelihood of success on the merits, "we need not, and thus do not, resolve the dispute over the legal standard applicable in the Federal Circuit . . . .").

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GPO U.S. GOVERNMENT PRINTING OFFICE: 2006-320-063:80139